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February 14, 2005

To: The Honorable Brian Kanno, Chair
and Members of the Senate Committee on Labor

Date: February 11, 2005
Time: 3:15 p.m.
Place: Conference room 229, State Capitol

From: Nelson B. Befitel, Director
Department of Labor and Industrial Relations

RE: S.B. 808 – Relating to Workers' Compensation

I. OVERVIEW OF CURRENT PROPOSED LEGISLATION

This is the administration's legislative proposal to reform our ailing workers' compensation system. This omnibus reform bill presents a balanced, common sense package of changes that will bring costs under control while ensuring that injured workers receive quality medical care and benefits that they need to return to work as soon as they are able.

The current system is costly and ineffective. Hawaii's employers pay one of the highest workers' compensation insurance premiums in the nation. The current system has little safeguards or effective procedures in place to eliminate, or even minimize, abuse. Hawaii's workers' compensation system was highlighted as one of only eight states to receive a failing grade in a recent national survey – a ranking that will surely stifle future economic growth and prosperity unless we take meaningful action this year.

This reform bill will:

Address fraud and abuse aggressively by allowing the Insurance Commissioner to investigate and prosecute anyone defrauding the system, regardless of whether it is committed by an employer, employee, medical provider, insurance company or other service provider.

- Last year, Governor Linda Lingle vetoed a bill that was passed by the Legislature because it allowed the Insurance Commissioner to investigate and prosecute fraud only if it is committed by the employer.

- This measure provides a more balanced and effective approach by allowing the Insurance Commissioner to investigate and prosecute anyone who is defrauding the system rather than just the employer.

Eliminate stress claims resulting from lawful personnel actions made in good faith by the employer. Currently, an employee may file a workers' compensation claim if the employee suffers from mental stress as a result of a transfer, layoff, promotion, retirement or any other (non-disciplinary) action.

- This measure ensures that employers can exercise their lawful management rights to take personnel action without fear of workers' compensation liability.

Extends the small business exemption to other forms of business entities. Our current laws allow owners of small corporations to "opt out" in obtaining workers' compensation insurance on themselves (as long as they obtain insurance covering their employees). However, this law is outdated as it does not provide this same option to owners of a small business formed under partnerships or structured under new forms of business entities such as a limited liability company.

- This amendment will allow all small business owners – regardless on how their business is structured – to immediately save costs by allowing them to "opt out" in obtaining workers' compensation insurance on themselves as individuals.

Allow employers' input on the treatment of their workers. This proposal would change -- not take away -- the way an employee is able to choose his or her doctor for treatment of job-related injuries.

- Employers will be allowed to contract with a network of physicians, who will treat their injured employees during the first four months of injury. After four months of treatment, the employee may see a medical provider outside of the physician network.

- The physician network must be approved by the director to ensure that necessary medical treatment is accessible to injured employees.

- Family Doctor. This proposal does not deny an injured worker to be treated by his or her family doctor. An employee may choose to see his or her family doctor at anytime before or after the first 120 days.

Limit Attending Physicians to Medical Doctors. This proposal will require the injured employee's primary care or "attending physician" be a medical doctor, dentist, osteopath or podiatrist, who would serve as the "gatekeeper." This process ensures injured workers are provided quality medical treatment while controlling costs.

- All referrals for treatment to other healthcare providers (chiropractors, massage therapists, naturopaths, etc.) must be made by the attending physician.

- Studies conducted nationwide and in Hawaii establish that alternative medicine (chiropractors, massage therapists, naturopaths, etc.) is not a cost-effective means of treating injured workers, and that care directed by medical doctors are less costly than care directed by chiropractors.

Limit Temporary Total Disability (TTD) to 104 weeks, except in unique circumstances. TTD benefits are intended to compensate an employee while the employee is temporarily disabled and unable to work. If an injured employee is permanently disabled, the employee is entitled to permanent disability payments.This amendment would limit TTD payments to 104 weeks, unless the worker's doctor determines that the employee has not reached a condition of "medical maximum improvement" and that the employee's condition continues to improve.

- By capping TTD at two years, this will encourage employees who can return to work, to do so.

- With regard to the employers' responsibility to provide benefits to the injured employee, the cap will encourage a determination of the extent of the injury and whether the employee is permanently disabled. If so, the employee would be entitled to indemnity benefits under the permanent partial disability provision of the law.

- This measure will facilitate prompt resolution of injuries resulting in permanent partial disability.

Allow greater employer involvement in an employee's vocational rehabilitation plan. If a work-related permanent injury prevents an employee from returning to his occupation, he may enter vocational rehabilitation. The purpose of vocational rehabilitation is to provide necessary training so that the injured employee can be employed in another occupation at an earning capacity that is comparable to his position prior to the injury. Under our current laws, the employee selects his or her own vocational rehabilitation plan and vocational counselor, without any input or oversight by the employer. In other words, the employer has "no voice" in developing its employee's vocational rehabilitation plan.

- This proposal will remove the "self referral" language of the statute and require the vocational rehabilitation plan to be designed and approved by both the employee and employer.

The vocational rehabilitation plan will also be subject to periodic review by employers and employees to ensure its effectives.

II. CURRENT LAW

- Last year, the The Work Loss Data Institute gave Hawaii's workers' compensation system an "F" for the years 2001 and 2002, noting that Hawaii has gone from "bad to worse."

- Hawaii's businesses are paying entirely too much for workers' compensation insurance.

- A recent national study ranks Hawaii THIRD highest in the entire nation in premiums. Hawaii's businesses on an average pay $3.48 for every $100 they pay in wages.

- California and Florida, who are ranked number one and two for having the highest premiums have saved their system by making necessary reforms.

- AM Best reported that premiums in Hawaii on an average, increased 24% in 2003. AM Best is the world's largest and oldest company devoted to issuing in-depth reports on the insurance market.

- Workers' compensation insurance premiums have doubled and tripled in the last five years for many of our local companies.

- We have a system where insurance carriers are forced to stop insuring a company as soon as the first workers' comp claim is filed.

- We have a system that has little safeguards or effective procedures to eliminate abuse.

- In a survey conducted recently by the Pacific Business News, 73% of our local businesses responded that their NUMBER ONE issue was the soaring costs of workers' Compensation (along with rising premiums for prepaid healthcare insurance).

III. SENATE BILL

The Department of Labor and Industrial Relations ("Department") supports these measures as they will improve the efficiency of workers compensation system, ensure that injured workers receive quality medical care and the benefits they need to return to work as soon as they are able to. This reform bill also attacks prevalent cost drivers in the system and provides sufficient safeguards or effective procedures to minimize or eliminate, fraud and abuse.

Addressing Fraud and Abuse

Amend the Fraud Violations and Penalties and The Insurance Fraud Investigations Unit.

This measure expands the State's Insurance Commissioner's jurisdiction to investigate and prosecute workers' compensation fraud. The Insurance Commissioner has been aggressive and successful in investigating and prosecuting automobile insurance fraud, and we believe it's a natural for the State's Insurance Commissioner to expand his office's expertise to workers' compensation fraud.

Act 234 was enacted in 1995 to address the growing problem of fraud in workers' compensation claims. There has been very few fraud cases investigated and prosecuted by the Department. This is mainly due to unwillingness by employers or employees to file complaints with the Department and resource constraints.

The following graph represents the total fraud complaints investigated by this Department:

*10 Complaints filed by one claimant.

PERIOD	TOTAL COMPLAINTS FILED	COMPLAINTS FILED AGAINST EMPLOYERS, DOCTORS, VOCATIONAL REHAB	COMPLAINTS FILED AGAINST EMPLOYEES/ CLAIMANTS
1999	15	4	11
2000	32*	22	10
2001	16	10	6
2002	20	14	6
TOTAL	83	50	33

Thirty-four, or 41% of fraudulent complaints filed during the period 1999-2002, were withdrawn or settled. Eighteen, or 55% of the employer's fraudulent complaints against claimants were upheld. None of the complaints filed by employees/claimants against employers/insurance carriers/physicians/vocational rehabilitation ("VR") were upheld.

Employers have complained that the investigation and prosecution of fraud is too costly. Most insurers say that once they have uncovered fraud, they usually settle the matter with the employee and sever future payments. Currently, any award that is won is paid into the State's Special Compensation Fund. Insurers also explain that it is rare to find a perpetrator of fraud that could reimburse the paid benefits as well as attorney's fees.

The amendment being proposed would allow the party who successfully investigates a fraud situation and wins a determination, to receive fifty percent of any award granted. The amendment also clarifies that the successful party shall recoup all payments made and receive reimbursement for attorney's fees. These amendments provide greater incentive to employers and employees that pursue fraud.

Improvements to the Current System

Currently, the State does not vigorously combat fraud. This amendment would place the investigation of fraud into the agency best equipped to pursue fraud. Actively pursuing fraud not only saves the system money and resources by catching and prosecuting offenders, but it also deters those who might take advantage of workers' compensation.

Eliminate stress claims resulting from lawful personnel actions made in good faith

This bill proposes to amend section 386-3, Hawaii Revised Statutes, by disallowing workers' compensation claims for mental illness or injury proximately caused by all personnel actions taken in good faith by the employer. Personnel actions include disciplinary action, counseling, work evaluation or criticism, job transfer, lay-off, promotion, demotion, suspension, termination, retirement, or other actions ordinarily associated with personnel administration.

This measure ensures that employers can exercise their lawful management right to take personnel action such as issuing a poor performance evaluation or not selecting an applicant for a promotion without fear of workers' compensation liability.

In Mitchell v. State of Hawaii, DOE, 85 Haw. 250 (1997), the Court held that a teacher's stress-related injury resulting from disciplinary action taken by the employer in response to her alleged misconduct was compensable under the workers' compensation law.

Consequently, in 1998, the legislature amended the H.R.S. 386-3 to exclude injuries arising from "good faith" disciplinary action from being compensable. However, under this 1998 amendment, injuries arising from all other good faith personnel actions are still compensable.

In December of 2002, the Hawaii Supreme Court rendered an opinion in the case of a firefighter against the City and County of Honolulu Fire Department, Davenport v. City and County of Honolulu, Honolulu Fire Department, Hawaii No. 23141, (2002). Mr. Davenport had filed for workers' compensation due to a mental stress injury he received while trying to attain a promotion. In Davenport, the Supreme Court opined that his stress-related injury is compensable.

In Davenport, the promotion process was an essential function of the employer and served an important interest of the employer. Thus, an injury that stems from such a process is compensable. Consequently, the Supreme Court held in Mr. Davenport's favor.

Improvements to the Current System

This measure will ensure that employers, who exercise their lawful right to take good faith personnel actions that are not disciplinary in nature, can do so without fear of economic reprisal in the form of inflated workers' compensation insurance costs and stress claims.

Employers will not be punished for making good faith personnel decisions that best serve their business. The current law as written, perpetuates the image of Hawaii as anti-business and should be changed.

Questions/Answers

Q. Would this amendment preclude mental stress altogether?
A. No. This amendment would only preclude stress caused by regular interaction of employers with employees in the normal course of their employment. It would not preclude a mental stress claim caused by the willful action of an employer who harasses an employee in bad faith.

Q. Is it the intent of the amendment to preclude a claim for mental stress if the employee suffers from paranoia, which causes a mental breakdown because the employee found the employers' promotion process unfair?
A. Yes. Workers' compensation is insurance that is provided to an injured employee for medical treatment and benefits if impaired or disabled. This system was established to protect employees and the employer from litigation that could bankrupt the employer.

The Hawaii Supreme Court, in both the Mitchell v. Department of Education and Davenport v. City and County of Honolulu, Honolulu Fire Department decisions, stated that if the Hawaii State Legislature had wanted to preclude personnel actions taken in good faith by employers, they should have explicitly included them in the law. Absent any specificity, all mental stress claims, excluding those caused by disciplinary action, would be compensable so long as they are work- related.

It is understood that the employer has an obligation to provide a safe and healthful workplace. However, in cases where a person's mental well-being is subject to how they personally view an employer's personnel action that is taken in good faith, filing a claim for mental stress should not be allowed.

Q. Is this legislation even necessary given that mental stress claims comprise only 1.5% to 1.6% of reported cases?
A. Yes. While mental stress on average is 1.6% of all claims reported (466 claims for calendar year 2002), the Department processes over a thousand a year (1,265 for 2002). In 2002, 504 claims costs Hawaii's employers to pay $6.3 million and absorb 37,484 of lost days of work.

Some have argued that because the amount of cases reported and money paid out each year is relatively small when compared against the total workers' compensation costs, that this is a non-issue.

This reasoning suggests that (1) we should wait until mental stress claims become a bigger problem and (2) that as long as my neighbor keeps taking my individual tools as opposed to my tool box, that there is no fundamental problem.

While $6.3 million may seem minimal compared to the total amount of $268 million in workers' compensation benefits paid out in 2002, we should be diligent and proactive to contain this situation. We should also be mindful that $6.3 million is a tremendous amount of money to the employers who pay it.

Extends the small business exemption to other forms of business entities.

The Department currently requires individual members with employees of a limited liability company and partners in a partnership to obtain workers' compensation coverage.

This amendment will give small business owners who meet certain exclusions the option to not obtain workers' compensation insurance regardless of the form of its business structure. This measure adds four new exclusions under the definition of "employment" relating to services performed by an individual who owns a major interest in the business: (i) a member of a limited liability company, (ii) a partner of a limited liability partnership, (iii) a sole proprietor, and (iv) services performed by a partner of a partnership.

Improvements to the Current System

This will allow owners and partners of corporations the ability to save costs by allowing them to not opt out in obtaining workers' compensation coverage for themselves as individuals.

Sole proprietors have been excluded from obtaining coverage; however, this will provide clarification to individuals who meet this exclusion. In addition, the reference to excluded services as defined in section 386-1, HRS, under both the workers' compensation and temporary disability insurance laws, will provide consistency in exclusions with statutes of other Department programs.

Questions/Answers

Q. Are there cost savings associated with this amendment?
A. Some limited liability companies and partnerships may experience immediate savings on their overall cost if they meet the exclusions and choose not to obtain workers' compensation coverage for themselves. It will also assist new and existing businesses by helping them determine if they will require specific types of coverage. Some employers who currently have coverage may be relieved from providing workers' compensation and temporary disability insurance due to the broadening list of excluded services.

Q. Will current employees be required to form LLC's, LLP's, or partnerships as a condition of employment?
A. No. An employer cannot require this as a condition of employment.

Allow employers' input on the treatment of their workers.

The Department proposes to amend this section to allow Hawaii's employers the opportunity to provide their employees with an employer-designated healthcare provider list of at least three attending physicians and/or physician networks, of which 50% must practice on the island where the injured employee resides. If the employer wishes to develop and implement an employer-designated healthcare provider list, then the employee would be mandated to see that physician for the first 120 days from the day of injury. The injured employee would then be allowed to "opt out " of the plan after the 120 days are complete and see a physician that is not on the list. This would allow employers greater success in entering into contracts with physician networks and/or managed care organizations for workers' compensation in order to control costs.

Additionally, this proposal does allow the employee to provide to the employer, upon employment or 12 months prior to the work injury, the name of their family doctor, whom is qualified to treat workers' compensation injuries under chapter 386, Hawaii Revised Statutes.

Improvements to the Current System

Employer-designated provider lists will allow an employer to control duration. As this report notes, claims have gone down, yet TTD, medical, and Lost Days have increased. This suggests that injured employees are being treated longer. This will allow employers greater input as to who can provide treatment.

This will also help employers to control costs by allowing them to designate physician networks or directed care organizations to provide care. The Workers' Compensation Research Institute has shown that "…workers' compensation medical networks are generally associated with much lower medical costs: 16 to 46 percent lower if the injured worker is treated exclusively by network providers and up to 11 percent lower if the worker is treated predominately, but not exclusively by network providers."33 *The Impact of Initial Treatment by Network Providers on Workers' Compensation Medical Costs and Disability Payments*. Sharon E. Fox, Richard A. Victor, Xiaoping Zhao. August 2001.

Further, allowing employers to provide a list of physicians for the employees to choose from would decrease delays in the workers' compensation system when conflicts arise. Currently, if either an employee or employer disagrees with the recommendation of the healthcare provider, the employer may send the employee to an Independent Medical Examiner ("IME"), at the cost of the employer, to be evaluated. A hearing is then scheduled to review the records of both providers. This process creates delays in resolving the case. The employer-designated choice of physician would reduce the need to hire an IME since the employer would have 120 days of medical history compiled by a physician the employer had already selected. It would save employers additional costs and expedite treatment and compensation of the injured employee.

Questions/Answers

Q. How is the selection process done and how do we ensure that the employee is protected?
A. The selection process would be left to the employer and its insurer. The Department believes that there are enough safeguards in the law to present a provider from not adequately treating the injured employee.

Further, the Department would be willing to amend this section of the bill to require the employer to allow the employee to select his or her family doctor as the attending physician under certain circumstances.

The overriding impetus for this measure is to manage and contain costs. The current system is failing and employers must have more control in order to reign in costs.

Q. Employers are already allowed to enter into managed care agreements and choice of physician. What is the reason for this amendment?
A. This is true, however, the employee is not obligated to receive treatment from the directed or managed care program, or see the employer's choice of physician. This lack of obligation has been raised as one of the reasons managed or directed care has not achieved great success in Hawaii.

Q. What if the employer does not provide the employee with an employer-designated healthcare provider list and/or physician networks?
A. Then the employee is still free to choose his or her own attending physician. The law would mandate that an employer must provide the list with at least three attending physicians and/or physician networks to the employee before an injury occurs.

Limit Attending Physicians to Medical Doctors.

The Department believes that an important aspect to controlling costs is to establish a "gatekeeper" process to ensure that palliative care services and the duration of medical treatment are not abused. The Department proposes to limit the attending physician, or primary health care provider, to medical doctors and dentists only.

The current system allows for fifteen treatments per injury for the first sixty days, and twenty treatments for therapists. Currently, the Attending Physician, who can be either a doctor

of medicine, a dentist, a chiropractor, an osteopath, a naturopath, a psychologist, an optometrist, or a podiatrist, can authorize additional treatment for 120 days. Employers have the right to deny this treatment through an administrative process.

The Attending Physician being proposed requires that all referrals for treatment to other healthcare providers (chiropractors, massage therapists, naturopaths, etc.) be deemed necessary by a medical doctor who is unable to perform that treatment. The referrals are limited to a period of 60 days or fifteen visits, whichever occurs first, and cannot be made to any person or company that the attending physician has a financial interest in. This limitation is proposed to eliminate abuse of services.

The medical fee schedule already mandates that there be only one Attending Physician. This amendment seeks to codify that rule in statute.

Improvements to the Current System

Studies conducted nationwide and in Hawaii suggest that alternative medicine is not a cost-effective means of treating injured workers. The goal of workers' compensation is to restore an injured employee as far as possible to pre-accident status in a manner that is cost-effective for the whole system. If a medical doctor can provide the same treatment as a practitioner of alternative medicine at a lower cost to the system and the employer, then that is what should be mandated. As specified earlier, studies have shown that physician-directed care is less costly than chiropractic-directed care in most states.

Further, many employers complain that alternative medicine practitioners (chiropractors, massage therapists, naturopaths, etc.) do not cure injuries and are inappropriate for workers' compensation. Limiting the Attending Physician to medical doctors eliminates the argument and criticism surrounding alternative medicine being utilized for workers' compensation injuries, which is being paid by employers. This also greatly minimizes or eliminates controversy surrounding the profession of the person responsible for coordinating the treatment plan for injured employees.

Questions/Answers

Q. Is it fair to limit the attending physician to medical doctors and dentists and exclude alternate health care providers such as chiropractors and massage therapists?
A. Workers' compensation is a **social insurance** intended to ensure that an injured employee receives the medical attention that they deserve and expect. While providers should expect to be adequately compensated, workers' compensation was never intended to be a profit-making enterprise.

Other healthcare providers are not excluded from providing services. The Department is simply insuring that the employee receives the necessary medical services in order to heal and return to work in the most cost-effective manner.

The State legislature sought to control medical cost through a medical fee schedule. The idea was to cap the amount paid to providers. However, as we have shown in this report, the opposite effect has happened, as medical costs have increased.

The Department recognizes that alternative healthcare providers do offer quality services. However, the law must balance the needs of the injured employee and the financial health of the employer.

Q. Will medical doctors in organizations such as Kaiser Permanente and Straub be allowed to refer clients within their organizations?
A. This language is not meant to exclude health maintenance organizations such as Kaiser Permanente from referring clients within their system. It is meant to deter abuse of the system by not allowing the attending physician to refer the employee to an organization that financially benefits them.

Q. What happens if the injured employee needs services beyond the 15 referrals or after the 60 days?
A. The attending physician would petition the Department for additional services. The Director would deny or grant the request based upon the advice of the attending physician.

Q. Will palliative care be limited for those patients that have a deteriorating condition that require medication or services beyond the initial 15 referrals or after the 60 days?
A. The attending physician would petition the Department in cases of extreme mental or physical injury or illness that require additional palliative care.

Limit Temporary Total Disability (TTD) to 104 weeks, except in unique circumstances.

This measure defines Maximum Medical Improvement ("MMI") and Amend Temporary Total Disability. (§386-1 and §386-31, HRS.)

This measure defines MMI as the point when no further improvement in the employee's condition is expected from curative healthcare or the passage of time. This amendment would eliminate most palliative care and TTD payments after MMI has been achieved.

TTD is meant for injured employees whose total disability injury is not permanent and who are expected to return to the workforce. This amendment, in concert with the definition of MMI, would limit TTD payments to 104 weeks.

In cases where the employee has not exhausted the 104 weeks, but there is disagreement on whether MMI has been reached, the employee would petition the Department for continuation of TTD payments for the remainder of the 104-week cap (2 years). If the injury continues to deteriorate, the employee can petition the Director for an extension of TTD payments beyond the 104 weeks.

Improvements to the Current System

The amendment would encourage employees that are capable, to return to work earlier. It would also establish a cap and platform to evaluate an employee for PTD or PPD payments. This process will likely motivate all parties involved to resolve the claim in the most expedient manner.

Questions/Answers

Q. Would capping TTD payments be unconstitutional or erode the employer's responsibility to provide benefits to an injured employee?
A. The Department does not believe so. Several states throughout the nation already cap TTD payments to control costs. For example, Massachusetts limits TTD payments to 156 weeks, while Minnesota caps TTD payments at 104 weeks.

By capping TTD at two years, the Department is encouraging employees who can return to work, to do so. With regard to the employer's responsibility to provide benefits to the injured employee, the cap will encourage a determination of the extent of the injury and whether the claimant is permanently disabled or entitled to an indemnity payment under permanent partial disability.

Q. Is two years a reasonable amount of time in which to cap TTD payments?
A. The Department feels that it is. While there are safeguards to allow for continuation of payments for injuries that deteriorate, there must be a point from which the employer and employee must decide if the total disability injury will ever heal and allow the employee to return to work. If not, then the employee should be evaluated for PTD/PPD, or, allow the insurer to adequately compensate the employee through an agreed upon settlement.

Allow greater employer involvement in an employee's vocational rehabilitation plan.

Vocational Rehabilitation costs have experienced rapid growth (31%) since 1995. Fundamental structural changes to the program are sorely needed to allow greater input by the employer in plan implementation and effectiveness.

Under the current law, the employee selects his or her own vocational rehabilitation plan and vocational counselor, without any input or oversight by the employer. In other words, the employer has "no voice" in developing the employee's vocational rehabilitation plan. The amendment removes the employee's sole right to self-refer and mandates the allowance of greater participation between the attending physician, vocational rehabilitation plan designer, employer and employee in plan design and plan review of a vocational rehabilitation program. The amendment also mandates that the employer, employee and plan designer conduct a review for effectiveness of the plan after 26 weeks for extension approval. If a disagreement exists on the design of the plan or its review, then any party can petition the Director to settle the disagreement.

The amendment also allows for an employer to redesign the injured employee's job through changes to the work process or function, providing alternative work within the employee's ability, or locating reemployment for the employee to satisfy an employer's obligation under vocational rehabilitation.

Improvements to the Current System

Employers and employees would see faster return to work and greater cost control.

Mandatory reviews of VR programs, will reduce costs, and prevent outrageous costs associated with vocational rehabilitation programs that exceed the scope of the workers' compensation program. The system envisioned in this bill requires the employer and employee to work together. This greater interaction will ensure that the employer is paying for services that are effective in rehabilitating the injured worker.

Questions/Answers

Q. How does the redesign and modification of an employee's old job or finding a new job satisfy the requirements of vocational rehabilitation?
A. The purpose of vocational rehabilitation and workers' compensation is to restore the injured employee's earning capacity, as nearly as possible, to the level which the employee possessed before the accident. If an employer is able to redesign the employee's workplace or find them alternative employment that allows the employee to work in their present condition and compensates them at the level in which they enjoyed prior to injury, that should satisfy the intent of vocational rehabilitation.